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U.S. Citizenship and Immigration Services

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FILE: [redacted] Office: PHOENIZ, AZ Date: MAY 18 2007

IN RE: Applicant: [redacted]

APPLICATION: Application for Waiver of Grounds of Inadmissibility under section 212(i) of the Immigration and Nationality Act, 8 U.S.C. § 1182(i).

ON BEHALF OF APPLICANT:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, Phoenix, Arizona, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed as the waiver application is moot.

The applicant is a native and citizen of Mexico who was found to be inadmissible to the United States pursuant to section 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(2)(A)(i)(I), for having committed a crime involving moral turpitude. The applicant is married to a naturalized citizen spouse. He seeks a waiver of inadmissibility under section 212(h) of the Act, 8 U.S.C. § 1182(i).

The District Director concluded that the applicant failed to establish that extreme hardship would be imposed on a qualifying relative, which in this case is his wife and children, and denied the Application for Waiver of Grounds of Excludability (Form I-601). *Decision of the District Director*, dated July 26, 2005.

Counsel submitted a timely Form I-290B on August 26, 2005, and indicated that a brief and/or additional evidence would be submitted to the AAO within 30 days. As of this date, however, the AAO has not received any additional evidence into the record. It is noted that on March 26, 2007 via facsimilie the AAO requested a brief and/or additional evidence from counsel. The AAO did not receive a response from counsel. The record as constituted is therefore complete.

Section 212(a)(2) of the Act states in pertinent part, that:

> (A)(i) [A]ny alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of-
>
> > (I) a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime . . . is inadmissible.

Section 212(h) of the Act provides, in pertinent part, that:

> (h) The Attorney General may, in his discretion, waive the application of subparagraphs (A)(i)(I) . . . of subsection (a)(2) . . . if -
>
> . . . .
>
> (1) (B) in the case of an immigrant who is the spouse, parent, son, or daughter of a citizen of the United States or an alien lawfully admitted for permanent residence if it is established to the satisfaction of the Attorney General that the alien's denial of admission would result in extreme hardship to the United States citizen or lawfully resident spouse, parent, son, or daughter of such alien . . . .

The record reflects that on April 19, 1999, the applicant pled guilty to the charge of interfering with judicial proceedings (DV), in violation of A.R.S. § 13-2810(A)(2). On April 7, 2003, he pled guilty to A.R.S. § 13-1203A.3, and the disposition report indicates the charge is "assault-touched to injure." The director concluded that the applicant's crimes involved moral turpitude, and accordingly found him inadmissible to the United States based on the provisions of the Act. *See* section 212(a)(2)(A)(i)(I) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(I).

In the Form I-1290B, counsel concedes with the director's conclusion that the applicant committed crimes of moral turpitude. The AAO finds that based on the evidence of record and case law, the applicant's crimes did not involve moral turpitude.

The applicant has two convictions. The AAO will first address whether the conviction under A.R.S. § 13-1203A.3, which reads as follows, is a crime involving moral turpitude:

> A. A person commits assault by:
> 1. Intentionally, knowingly or recklessly causing any physical injury to another person; or
> 2. Intentionally placing another person in reasonable apprehension of imminent physical injury; or
> 3. Knowingly touching another person with the intent to injure, insult or provoke such person.
> B. Assault committed intentionally or knowingly pursuant to subsection A, paragraph 1 is a class 1 misdemeanor. Assault committed recklessly pursuant to subsection A, paragraph 1 or assault pursuant to subsection A, paragraph 2 is a class 2 misdemeanor. Assault committed pursuant to subsection A, paragraph 3 is a class 3 misdemeanor.

In *Matter of Perez-Contreras*, 20 I&N Dec. 615, 617-18 (BIA 1992), the Board of Immigration Appeals (BIA) held that:

> [M]oral turpitude is a nebulous concept, which refers generally to conduct that shocks the public conscience as being inherently base, vile, or depraved, contrary to the rules of morality and the duties owed between man and man, either one's fellow man or society in general. Assault may or may not involve moral turpitude. Simple assault is generally not considered to be a crime involving moral turpitude.
>
> In determining whether a crime involves moral turpitude, we consider whether the act is accompanied by a vicious motive or corrupt mind. Where knowing or intentional conduct is an element of an offense, we have found moral turpitude to be present. However, where the required mens rea may not be determined from the statute, moral turpitude does not inhere.

(Citations omitted.)

The AAO finds that there is no clear-cut definition of "moral turpitude." In *Grageda*, the Ninth Circuit Court stated that in "[d]escribing moral turpitude in general terms, courts have said that it is an "act of baseness or depravity contrary to accepted moral standards." *Grageda v. INS*, 12 F.3d 919, 921 (9th Cir.1993)(quoting *Guerrero de Nodahl v. INS*, 407 F.2d 1405, 1406 (9th Cir. 1969)) *See also McNaughton v. INS*, 612 F.2d 457, 459 (9th Cir.1980)("Whether a particular crime involves moral turpitude "is determined by the statutory definition or by the nature of the crime not by the specific conduct that resulted in the conviction.") With regard to the crime of assault, courts generally have held that a conviction for simple assault does not involve moral turpitude. *See, e.g., Reyes-Morales v. Gonzales*, 435 F.3d 937, 945 n. 6 (8th Cir.2006) (observing that simple assault does not involve moral turpitude).

U.S. courts and the BIA have held that not all crimes involving assault or battery are considered crimes involving moral turpitude. For example, the BIA in *In re Sanudo*, 23 I. & N. Dec. 968, 970-971 (BIA 2006), stated that it has long been recognized that not all crimes involving the injurious touching of another reflect moral depravity on the part of the offender, even though they may carry the label of assault, aggravated

assault, or battery under the law of the relevant jurisdiction. (citing *Matter of B-*, 1 I&N Dec. 52, 58 (BIA, A.G. 1941) (finding that second-degree assault under Minnesota law does not qualify categorically as a crime involving moral turpitude (following *United States ex rel. Zaffarano v. Corsi*, 63 F.2d 757, 758 (2d Cir. 1933))). In *Matter of Fualaau*, 21 I&N Dec. 475 (BIA 1996), the BIA held that that third-degree assault under the law of Hawaii, an offense that involved recklessly causing bodily injury to another person, is not a crime involving moral turpitude. And in *Matter of Perez-Contreras*, 20 I&N Dec. 615 (BIA 1992), the BIA concluded that that third-degree assault under the law of Washington, an offense that involved negligently causing bodily harm accompanied by substantial pain that extends for a period sufficient to cause considerable suffering, is not a crime involving moral turpitude.

As a general rule, a crime involves "moral turpitude" if it is inherently base, vile, or depraved, and contrary to the accepted rules of morality and the duties owed between persons or to society in general. Whether a particular crime involves moral turpitude is determined by reference to the statutory definition of the offense and, if necessary, to authoritative court decisions in the convicting jurisdiction that elucidate the meaning of equivocal statutory language. However, the actual conduct underlying the conviction cannot be considered. (citations omitted). *In re. Sanudo* at 970-971.

The Ninth Circuit and the BIA have found that with regard to domestic violence crimes, which is the case here, the special relationship between the parties is not sufficient, by itself, to turn every battery or assault under the statute into a crime that involves moral turpitude. In *Galeana-Mendoza,* 465 F.3d 1054, 1060 (9th Cir. 2006), the court stated that in the context of a relationship of a special, domestic nature, when there is force that is neither violent nor severe and that causes neither pain nor bodily harm, yet is considered battery under a statute, the special relationship between the parties is not sufficient to, by itself, transform *every* battery under the statute into a crime categorically grave, base, or depraved. The BIA stated in *In re Sanudo*, that in the absence of admissible evidence reflecting that the respondent's offense occasioned actual or intended physical harm to the victim, ··· the existence of a current or former "domestic" relationship between the perpetrator and the victim is insufficient to establish the morally turpitudinous nature of the crime. *Id.* at 973.

In determining whether a crime involving domestic violence qualifies as one of moral turpitude, the Ninth Circuit indicated that it applies the categorical and modified categorical approaches. *See, e.g., Galeana-Mendoza* at 1057-1058; *Jose Roberto Fernandez-Ruiz vs. Gonzales,* 468 F.3d 1159, 1163 (9th Cir. 2006). Under the categorical approach, it looks "only to the fact of conviction and the statutory definition of the prior offense," and determines whether "the full range of conduct proscribed by the statute constitutes a crime of moral turpitude." If it does not, it applies the modified categorical approach, under which it may look beyond the language of the statute to a narrow, specified set of documents that are part of the record of conviction, including the indictment, the judgment of conviction, jury instructions, a signed guilty plea, or the transcript from the plea proceedings, to determine whether the alien was in fact convicted of an offense that qualifies as a crime involving moral turpitude. The Ninth Circuit stated that it does not look beyond the record of conviction itself to the particular facts underlying the conviction. *Galeana-Mendoza* at 1057-1058.

When analyzing the elements of a statute, if a statute lacks an injury requirement and includes no other inherent element evidencing "grave acts of baseness or depravity," a conviction under the statute does not qualify as a crime categorically involving moral turpitude. *Galeana-Mendoza* at 1060. For a finding of moral turpitude, the domestic violence statute must also have a "willful" or "intentional" element. *See, e.g., Jose Roberto Fernandez-Ruiz* at *1166*. (statute must have element of willfulness and conduct resulting in bodily

injusry that is more than insubstantial); *Grageda v. INS,* 12 F.3d 919, 922 (9th Cir.1993) (finding that when a person willfully beats his or her spouse severely enough to cause 'a traumatic condition,' he or she has committed an act of baseness or depravity contrary to accepted moral standards.)

Applying the categorical approach to A.R.S. § 13-1203A.3 under which the applicant was convicted, reveals that the statute has an injury requirement as well as a *mens rea* element. A person can be convicted under the code for knowingly touching a person with the intent to injure, insult, or provoke the person. With domestic violence statutes, the Ninth Circuit has found that not all conduct that is criminalized under the statute involves moral turpitude. In *Jose Roberto Fernandez-Ruiz*, the Ninth Circuit found that Arizona's class 2 misdemeanor assault offense lacks two elements, each of which was crucial to the finding of moral turpitude in *Grageda*: a conviction for a class 2 offense requires neither willful conduct nor conduct resulting in bodily injury that is more than insubstantial. "A simple assault statute which permits a conviction for acts of recklessness, or for mere threats, *or for conduct that causes only the most minor or insignificant injury* is not limited in scope to crimes of moral turpitude." *Id.* at 1167. (emphasis added.) The court indicated that "[b]ecause the offenses set forth in Arizona's battery statute . . . include conduct that does not necessarily involve moral turpitude, [redacted] class 2 misdemeanor offense cannot, under the categorical approach, constitute a crime involving moral turpitude." *Id.* The Ninth Circuit has stated that a spousal contact that causes minor injury does not constitute a crime of moral turpitude. *Jose Roberto Fernandez-Ruiz at 1167.*

Here, A.R.S. § 13-1203A.3 criminalizes the touching of another person with the intent to injure, insult, or provoke the person. In applying the Ninth Circuit's holding in *Jose Roberto Fernandez-Ruiz,* which is that a finding of moral turpitude requires willful conduct and conduct resulting in bodily injury that is more than insubstantial, to the Arizona statute under consideration here, the AAO finds that the Arizona statute criminalizes conduct that does not involve moral turpitude: the touching of another person with the intent to injure, insult, or provoke the person criminalizes conduct that is minor (touching a person with the intent to insult and provoke) and therefore insubstantial. Thus, a conviction under the domestic violence statute does not, under the categorical approach, constitute a crime involving moral turpitude.

The Ninth Circuit in *Jose Roberto Fernandez-Ruiz* did not apply the modified categorical approach because the record did not contain any "documentation or judicially noticeable facts that clearly establish that the conviction is a [crime of moral turpitude]." (citations omitted). *Id.* at 1168. A domestic violence/assault conviction will not qualify as a crime of moral turpitude if the administrative record does not specify whether an alien pled guilty to a particular subsection of a statute, and if any of the subsections cover conduct that does not involve moral turpitude. *Id.*

With the instant case, the disposition report indicates that the conviction charge is "assault-touched to injure." This is insufficient to establish whether the "touching to injure" was of a serious or minor nature. In the absence of this information, the record lacks evidence to establish that the applicant's conviction is for a crime of moral turpitude.

With regard to the conviction pursuant to the charge of interfering with judicial proceedings (DV), in violation of A.R.S. § 13-2810(A)(2), the statute provides that a person commits interfering with judicial proceedings if such person knowingly disobeys or resists the lawful order, process or other mandate of a court. In applying the categorical approach here, the statute criminalizes a person for interfering with judicial proceedings by disobeying or resisting a lawful order, process or other mandate of a court. In applying the

Ninth Circuit's holding in *Jose Roberto Fernandez-Ruiz,* which is that a finding of moral turpitude requires willful conduct and conduct resulting in bodily injury that is more than insubstantial, to A.R.S. § 13-2810(A)(2), the AAO finds that the Arizona statute criminalizes conduct that does not involve moral turpitude: disobeying or resisting a lawful order, process, or other mandate of a court criminalizes conduct that does not involve injury to another person. Thus, a conviction under A.R.S. § 13-2810(A)(2) does not, under the categorical approach, constitute a crime involving moral turpitude.

The AAO cannot apply the modified categorical approach, as the record of conviction does not contain any documentation or judicially noticeable facts that clearly establish that the applicant's conviction is for a crime of moral turpitude.

Based on the record, the AAO finds that the applicant did not commit a crime involving moral turpitude and he is not inadmissible under section 212(a)(2)(A)(i)(I) of the Act. The waiver filed pursuant to section 212(h) of the Act is therefore moot. As the applicant is not required to file the waiver, the appeal of the denial of the waiver will be dismissed.

In proceedings for application for waiver of grounds of inadmissibility under section 212(a)(6)(C) of the Act, the burden of proving eligibility remains entirely with the applicant. *See* Section 291 of the Act, 8 U.S.C. § 1361. The applicant has met that burden.

ORDER: The July 26, 2005 decision of the director is withdrawn. The appeal is dismissed as the underlying application is moot.